Tejas Electrical Services, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 716. Case 16–CA–20937

October 11, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On November 21, 2001, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The General Counsel filed exceptions and a supporting brief. The Charging Party Union filed a statement concurring in the General Counsel's exceptions and supporting brief. The Respondent filed cross-exceptions, a supporting brief, and a brief in reply to the General Counsel's exceptions.

The Board has considered the decision and record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The Respondent is a Houston, Texas electrical contractor. On February 12, 2001, four union members applied for work with the Respondent.[1] Two of the individuals, Casey and Rath, concealed their union affiliation and were hired after being interviewed by the Respondent's field superintendent, Keith Carter.

The other two applicants, Smith and Bornsheuer, identified themselves as union organizers on applications submitted to the Respondent's receptionist. Subsequently, David Robinson, who identified himself as the Respondent's "Director of Estimating," approached Smith and Bornsheuer in the reception area. Holding their applications in his hand, Robinson told Smith and Bornsheuer that their "applications made the field superintendent nervous so they sent [me] out to talk to [the applicants]." Robinson added that he was "either a contractor or worked for a union contractor in the Washington, D.C.-Virginia area," that he worked with union electricians in the past and was satisfied with their work, "but that the person he worked for did not care for unions." It is undisputed that at no time during their conversation did Robinson mention anything about work opportunities at the Respondent or discuss the applications filed by Smith and Bornsheuer. They were not hired.

The judge dismissed the complaint. He found that the General Counsel failed to establish the required element of union animus as a factor in the decision not to hire Smith and Bornsheuer. Although the judge found "some suspicion" in the fact that the two covert union applicants were hired instead of the two overt union members, he reasoned that if coverts Rath and Casey were the first ones who applied on February 12, "then this priority demonstrates a nondiscriminatory reason" for their hiring. Because he found the evidence unclear as to which pair of applicants applied first, the judge rejected the General Counsel's argument that animus could be inferred solely because two covert union applicants were hired and two overt union applicants were not hired on February 12.

The General Counsel argued that the Respondent's union animus was also exhibited by Robinson's remarks that the Respondent "did not care for unions" and that the applications of the overt union organizers made one of the Respondent's officials "nervous." The judge rejected this argument as well. As an initial matter, he found that Robinson was not Respondent's agent and, hence, his statements were not attributable to Respondent. But even assuming that Robinson was an agent, the judge concluded that as a legal matter Robinson's statements do not establish animus.

Our dissenting colleague would find that the judge erred in failing to find that (1) the overt union organizers applied before their covert brethren, permitting an inference of animus from the timing and sequence of events, (2) Robinson did act as the Respondent's agent, and (3) the statements made by him were legally sufficient to warrant the inference of animus. She would remand this case to the judge for further consideration of these and related matters.[2]

We see no need for a remand in the circumstances of this case. Even assuming, arguendo, that Smith and Bornsheuer applied for jobs before Casey and Rath did,[3]

[1] All dates are in 2001.

[2] The Respondent argues in cross-exceptions that the judge violated the Board's *Jencks* rule by denying the Respondent's requests for copies of affidavits given by the General Counsel's witnesses in cases other than the instant proceeding. See Sec. 102.118 of the Board's Rules and Regulations. We find that the judge erred by summarily denying the Respondent's requests for production of the disputed affidavits without making a determination, through in-camera inspection, that the affidavits were not relevant to issues raised in this case. See *Caterpillar, Inc.*, 313 NLRB 626 (1994). However, any issue concerning the relevance of these affidavits is moot, and the judge's error was non-prejudicial, in light of our dismissal of the complaint. Contrary to the dissent, we see no need to remand this matter to the judge.

[3] We do not agree with the dissent, however, that the judge ignored Smith's "uncontroverted" testimony that he telephoned Rath after he was not hired and only then did Rath and Casey go to the jobsite to apply for work. Although the judge did not specifically mention this testimony about the telephone call, he expressly acknowledged that "Smith testified that he and Bornsheuer arrived at the Respondent's offices before Rath and Casey." The judge discounted Smith's testi-

we find that there is an insufficient basis for inferring union animus merely from the chronological order of applications, in the absence of evidence that the Respondent had a practice of hiring on a first-come, first-hired basis. Moreover, there is no basis for finding that the job credentials of Smith and Bornsheuer were so superior to those of applicants hired after them that they should have been hired absent a discriminatory motive.[4] We also agree with the judge that even assuming, without deciding, that Robinson acted as an agent of the Respondent when speaking to Smith and Bornsheuer, his statements did not constitute sufficient evidence to meet the General Counsel's initial burden of proving that union animus tainted the hiring process. We recognize, as our dissenting colleague points out, that statements like this *permit* the inference of union animus. But the Board is not *required* to make that inference,[5] and we decline to do so here.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. October 11, 2002

William B. Cowen, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

As discussed below, I would remand this case to the judge for a reexamination of whether the General Counsel established that the Respondent was motivated by union animus in its decision not to consider or hire applicants Jack Smith and Jack Bornsheuer.[1]

The complaint alleges a refusal to consider and/or hire Smith and Bornsheuer, who identified themselves as union organizers on their applications. The judge, finding that the General Counsel had not proved animus, dismissed the complaint in a bench decision.[2] The General Counsel excepts to the dismissal and the Respondent excepts to the refusal of the judge to examine in camera (and redact) the General Counsel's witnesses' affidavits in other unrelated salting cases and to supply those statements to the Respondent for purposes of cross-examination.

Briefly, the facts are as follows. Four applicants applied for work on February 12, 2001. Smith and Bornsheuer identified themselves as union organizers on their applications. They were not hired on that date. Gordon Casey and Ray Rath did not reveal their union affiliation to the Respondent and were hired that same day. Other applicants were subsequently hired for additional openings within the next several months.

When Smith and Bornsheuer arrived at the job site, the receptionist gave them applications. Smith and Bornsheuer filled out the forms and returned them to the receptionist. A while later alleged agent David E. Robinson appeared at the receptionist's area holding the two applications. Robinson gave Smith and Bornsheuer a card identifying himself as Director of Estimating. Robinson said that the applications "made the field superintendent nervous so they sent him out to talk to [Smith and Bornsheuer]." Robinson invited them to accompany him to a back office. Robinson stated that he had no trouble with union employees but the person he worked for did not care for unions.

The judge recommended dismissing the complaint, finding that the General Counsel had not met his burden of showing that antiunion animus tainted the hiring process. In my view, this dismissal is premised on several errors that require a remand.

(1) The judge held that he could not infer animus from the timing and sequence of events. Although he found it suspicious that the two covert union applicants (Rath and Casey) were hired instead of Smith and Bornsheuer (both overt), he reasoned that if the covert applicants applied first, and there were only two openings that day, then a nondiscriminatory reason for their hiring would be established. In his view, the evidence did not establish that there were more than two openings that day and was unclear as to which pair arrived first. He found that even though Smith and Bornsheuer testified that they arrived

mony after balancing it against that of the other three February 12 applicants.

[4] The dissent further asserts that the hiring pattern of February 12 does not stand alone as evidence from which to infer union animus, because there was also evidence of post-February 12 job openings filled by other applicants which the Respondent failed to explain. The first such opening filled after February 12 was on March 21. The next openings occurred on June 25, July 10 and July 19. The General Counsel does not argue in his exceptions brief that this job should have been offered to Smith or Bornsheuer.

[5] See *NACCO Materials Handling Group*, 331 NLRB 1245, 1245–1246 (2000)

[1] As discussed below, I agree with my colleagues that the judge erred by summarily denying the Respondent's request for certain affidavits given by the General Counsel's witness. Given my disagreement with the judge on several of his substantive findings, I would find, unlike my colleagues, that the procedural error was prejudicial.

[2] Following the conclusion of the General Counsel's case, the Respondent rested its case without presenting any testimony.

at 10 and Casey testified that he arrived between 10 and 10:30, the evidence "does not rule out" the possibility that Smith and Bornsheuer arrived after Rath and Casey.

There are two problems with this finding. First, it ignores uncontroverted testimony that Smith called Rath after he was not hired and only then did Rath and Casey go to the job site and apply. Thus, contrary to the judge's finding, it is clear from the record that Smith and Bornsheuer applied first. Therefore, the judge's finding that the hiring sequence could not support an inference of animus may have been erroneous. Second, even if, as the judge speculated, the only two openings that day were filled first by Rath and Casey, that fact would not preclude an inference of animus. The evidence is clear that there were subsequent openings within a short period of time, which were filled by other applicants. No explanation was given as to why Smith and Bornsheuer were not considered or hired for those openings.

I would remand to the judge to consider more carefully the evidence relating to the sequence of events and, in light of that evidence, to reexamine his finding that animus did not taint the hiring process.[3]

(2) The judge refused to rely on the statements made by alleged agent Robinson to establish animus because in his view (a) the record fails to establish Robinson's supervisory or agency status, and (b) the statements themselves are insufficient to establish animus. I question both of these findings.

(a) The judge found no apparent agency because no one from management made any statement to Smith and Bornsheuer that Robinson had authority to speak on its behalf concerning the hiring process. According to the judge, the only evidence to suggest delegation comes from Robinson's own words, and a putative agent's own words do not constitute a "manifestation by the principal." The judge found that Robinson's business card does not constitute a manifestation of delegation by the principal because such cards "can be created at home," and, in any event, a Director of Estimating "has little apparent connection to the hiring process." In the judge's view, Robinson's appearance at the reception area with the applications was an action by the alleged agent, not a manifestation by the principal.[4]

In determining whether an individual is an agent of the employer, the Board applies the common law principles of agency as set forth in the Restatement (Second) of Agency. *Allegany Aggregates*, 311 NLRB 1165 (1993); *Dentech Corp.*, 294 NLRB 924, 925–926 (1989). Under the doctrine of apparent authority, agency status may be established where the employer's manifestations to a third party supply a reasonable basis for the third party to believe that the employer has authorized the alleged agent to do the acts in question. *Allegany Aggregates*, supra, 311 NLRB at 1165. Thus, either the employer must intend to cause the third person to believe that the alleged agent is authorized to act for him, or the employer should realize that its conduct is likely to create such belief. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988); Restatement (Second) of Agency, § 27, Comment a (1958). Statements of the putative agent do not constitute evidence of agency status. *MPG Transport, LTD*, 315 NLRB 489, 493 (1994), enfd. 91 F.3d 144 (6th Cir. 1996); *Virginia Mfg. Co.*, 310 NLRB 1261, 1266 (1993), enfd. 27 F.3d 565 (4th Cir. 1994); Restatement (Second) of Agency, supra, § 284, Comment d.

I believe that Robinson's appearance at the reception area with the Smith and Bornsheuer applications, coupled with the statement that he was sent by the field superintendent, may be sufficient to establish apparent agency even if those words were spoken by Robinson. When the field superintendent gave Robinson the applications and sent him to deal with the applicants, he should have realized that such conduct would be likely to create a belief that Robinson was authorized to act for him in the hiring process. Because he was carrying applications and relating words spoken by the field superintendent, Robinson was not merely expressing his own belief that he had the authority to deal with the applicants, but rather he was showing Smith and Bornsheuer that the principal specifically directed him to deal with them concerning their applications.

This may constitute a sufficient manifestation by the principal of the delegation of authority. I would not, however, definitively make this finding at this time. Rather, because I believe that a remand for reconsideration of the judge's finding on the question of animus is necessary, as discussed further below, I would allow the judge to reexamine his finding on the agency issue as well.

(b) Robinson told Smith and Bornsheuer that "the person he worked for did not care for unions" and that their applications made the field superintendent nervous. The judge found that even if Robinson's statements were attributable to the Respondent, they would not establish animus. In the judge's view, "[a]n expression of distaste does not, by itself, connote an intent to disobey."

[3] The finding should also be reexamined in light of any new cross-examination resulting from the affidavits of the General Counsel's witnesses, as discussed below.

[4] My colleagues find it unnecessary to pass on Robinson's agency status because they find that the statements, even if made by an agent of the Respondent, do not constitute evidence of animus. As discussed below, I disagree with that finding.

Contrary to my colleagues and the judge, I believe that these statements, if made by an agent of the Respondent, would tend to establish animus, in the context in which they were made. Robinson appeared to be a key actor in the hiring process, his statements were uttered in the course of that process, and they permit the reasonable inference that the union affiliation of the applicants was a motivating factor in the Respondent's unfavorable treatment of their applications.[5]

Thus, if Robinson's statements were made by an agent of the Respondent (see section (a) above), I would find, contrary to the judge, that the General Counsel has met his burden of showing that union animus motivated the Respondent's decision not to consider or hire Smith and Bornsheuer. I cannot, however, definitively make this finding at this time because of the judge's procedural error discussed below, and would instead remand this issue to the judge for reconsideration.

(3) I agree with my colleagues that the judge also erred when he summarily denied the Respondent's requests for production of affidavits given by the General Counsel's witnesses during the investigation of other unrelated cases in which the witnesses acted as union salts.

I agree with my colleagues that the judge should have determined, through in camera inspection, whether the affidavits were relevant to the issues raised in the instant case. See Section 102.118 of the Board's Rules and Regulations; *Caterpillar, Inc*., 313 NLRB 626 (1994). The failure of the judge to do so may have resulted in the impairment of the Respondent's right of cross-examination. My colleagues find this error nonprejudicial because they dismiss the complaint on the merits due to an insufficient showing of animus. However, because of my view that the judge's no animus finding may have been erroneous in several substantive respects, I cannot join my colleagues in finding this error nonprejudicial.

Although I would be inclined to find, contrary to the judge, that the General Counsel has established the element of antiunion animus, I cannot definitively make such a finding at this time, without giving the Respondent an opportunity to adequately cross-examine the General Counsel's witnesses. Accordingly, I would remand this case to the judge with the following instructions:

(1) Examine in camera the affidavits given by the General Counsel's witnesses in other unrelated cases and determine if they contain anything relevant to the issues in this case. If so, the judge should redact the affidavits, provide them to the Respondent, and reopen the record to allow the Respondent to further cross-examine the General Counsel's witnesses.

(2) Reexamine his no animus finding in light of any new cross-examination, as well as any previous evidence concerning the timing of the applications and subsequent hiring that the judge apparently ignored.

(3) Reexamine his agency finding and its effect on his no animus finding.

(4) Reexamine his finding that Robinson's statements, if Robinson were an agent of the Respondent, would not be evidence of animus because they are protected by Section 8(c).

(5) If the judge finds that a prima facie case has been established, determine whether, in light of the Respondent's failure to present any testimony, the Respondent has met its burden of showing that Smith and Bomsheuer would not have been considered for hire or hired absent their union affiliation.

Dated, Washington, D.C. October 11, 2002

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Robert Levy, Esq., for the General Counsel
Judith B. Sadler, Esq. and Charles Sykes, Esq. (Sadler & Sykes), of Houston, Texas, for the Respondent
Patrick M. Flynn, Esq., of Houston, Texas, for the Charging Party

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on October 29, 2001, in Houston, Texas. After the parties rested, I heard oral argument, and on October 30, 2001, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing

[5] The judge's assertion that Robinson's statements cannot be considered as evidence of animus because they do not contain an explicit threat of reprisal or force or promise of benefit is inconsistent with current Board law. See, e.g., *Overnite Transportation*, 335 NLRB No. 33, slip op. at 4 fn. 15 (2001); *Mediplex of Stamford*, 334 NLRB No. 111, slip op. at 1 (2001); *Affiliated Foods*, 328 NLRB 1107 (1999); *American Packaging Corp*., 311 NLRB 482 fn. 1 (1993); *Gencorp*, 294 NLRB 717 fn. 1 (1989); *Smith's Transfer Corp*., 162 NLRB 143, 161–164 (1966). See also *John W. Hancock, Jr., Inc.*, 337 NLRB No. 183, fns. 8 & 10 (2002) (majority disagreeing with this line of cases, but acknowledging that they represent extant Board law; see fn. 2 of my dissent).

this decision.[1] The Conclusions of Law and Order provisions are set forth below.

Conclusions of Law

1. The Respondent, Tejas Electrical Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Brotherhood of Electrical Workers, Local Union No. 716, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act by any manner alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Complaint is dismissed.

Dated Washington, D.C. November 21, 2001

APPENDIX A

This is a bench decision in the case of Tejas Electrical Services, Inc., which I will call the "Respondent," and International Brotherhood of Electrical Workers, Local Union No. 716, which I will call the "Charging Party" or the "Union." The case number is 16–CA–20937.

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that a preponderance of the evidence does not establish that Respondent discriminated against two job applicants in the manner described in the Complaint, and recommend that the Complaint be dismissed.

Procedural History

This case began on February 21, 2001, when the Charging Party filed its initial charge in this proceeding. On April 20, 2001, after investigation of the charge, the Regional Director of Region 16 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

Admitted Allegations

Respondent filed a timely Answer to the Complaint. Based on admissions in this Answer, I find that the government has proven the allegations in Complaint paragraphs 1, 2, 3, 4 and 5. More specifically, I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

Unfair Labor Practice Allegations

Complaint paragraphs 8 and 9 allege that since on or about February 12, 2001, Respondent has refused to consider and/or hire two job applicants, Jack Smith and Jack Bornsheuer, because they formed, joined or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. Respondent denies these allegations.

The record establishes that on February 12, 2001, four persons affiliated with the Union applied for work at the Respondent's office. Two of these individuals, Smith and Bornsheuer, submitted applications which revealed their relationship with the Union. The other two, Gordon Casey and Ray Rath, submitted applications which did not disclose their Union affiliation.

Respondent hired Casey and Rath in February 2001. It hired other applicants in the period March through July 2001. However, Bornsheuer never received a job offer from Respondent. Smith did not receive such an offer until October 2001.

The *FES* Standard

To evaluate these allegations, I will follow the framework established by the Board in *FES (A Division of Thermo Power)*, 331 NLRB [9] (May 11, 2000). In that case, the Board stated that to prove a discriminatory refusal to hire, the General Counsel must first establish the following:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct;
>
> (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and
>
> (3) that antiunion animus contributed to the decision not to hire the applicants.

Once these elements are established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the government meets its burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established.

With respect to refusal–to–consider allegations, the Board held in *FES* that the government must show, as part of its case–in–chief, that the employer excluded applicants from a hiring process, and that antiunion animus contributed to the decision not to consider the applicants for employment. See *FES (A Division of Thermo Power)*, 331 NLRB [9] Once these elements are established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. See also *Kanawha Stone Company, Inc.*, 334 NLRB No. 28 (June 6, 2001).

[1] The bench decision appears in uncorrected form at pages 141 through 160 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

The Refusal to Hire Allegations

The General Counsel has established the first *FES* element. The record clearly establishes that Respondent was hiring employees on February 12, 2001. On that date, it hired at least two workers, Rath and Casey. In the next 6 months, it hired at least five other employees.

The government also has established the second *FES* element. Both Smith and Bornsheuer were fully qualified journeyman electricians.

The General Counsel has not proven the third *FES* element, that antiunion animus contributed to the decision not to hire the applicants. To make such a showing, the government relies on two types of evidence. First it argues that such animus may be inferred from the hiring pattern itself. Second, it contends that a person named David Robinson possessed apparent authority to act as Respondent's agent and that Robinson made statements which reflect animus in the hiring process.

In appropriate cases, an inference of animus may be drawn from evidence which includes a hiring pattern suggesting disparate treatment. The Board specifically noted in *FES*, "In most cases where 8(a)(3) violations are found, the conclusion is inferred from all of the circumstances. We know of no case which eschews this approach, and we would not abandon it."

Here, the General Counsel has presented evidence which, in some ways, resembles a scientific experiment: Four individuals applied for employment. The two applicants who did not disclose their union affiliation were hired right away, but the two applicants who did disclose their union affiliation did not receive such prompt offers of employment. If the two applicants hired by Respondent are considered, in scientific terms, to be "controls," then results suggest a strong correllation between disclosure of union affiliation and not being hired.

The Respondent contends that this experiment is flawed. It argues that Houston area electrical contractors knew that one of the employees it did hire on February 12, 2001—Ray Rath—was affiliated with the Union. However, the Respondent did not present evidence to establish that its management was aware of Rath's Union affiliation on the day he applied for work.

The experiment may be imperfect in another way. The evidence does not establish that Respondent had more than two job openings to fill on February 12, 2001 or that it hired more than two applicants. If the two individuals hired on February 12, 2001—Rath and Case—applied before Smith and Bornsheuer, then this priority demonstrates a nondiscriminatory reason for hiring them rather than the latter two applicants.

Smith testified that he and Bornsheuer arrived at the Respondent's offices before Rath and Casey, but this testimony must be examined carefully because it is not based upon firsthand observations. Smith did not testify that he was waiting at Respondent's offices and saw Rath or Casey walk in. Indeed, the record does not indicate that either Smith or Bornsheuer saw Rath or Casey that day at Respondent's offices.

Rather, Smith bases his conclusion—that he and Bornsheuer arrived at the offices before Rath and Case—on conversations he had later with those two applicants. But when Rath and Casey testified, they did not provide information which would support the conclusion Smith drew. Either they told Smith something different from their testimony, or else Smith drew an unwarranted conclusion from what they said to him.

Both Smith and Bornsheuer testified that they arrived at Respondent's offices about 10 a.m. on February 12, 2001. Casey testified that he arrived sometime between 10 and 10:30 a.m. on that date. That testimony is consistent with Smith's claim that he and Bornsheuer arrived first, but it does not rule out the opposite possibility.

Additionally, it seems possible that one or more of the witnesses may have been mistaken about the time of arrival. If all of them arrived at the stated times, it would appear rather likely for Smith and Bornsheuer to have seen Casey at some point. But they did not. In these circumstances, I am not convinced that the witnesses recalled their times of arrival with sufficient certainty to establish which of them arrived first.

Rath's testimony is even less certain. Although his application is dated February 12, 2001, Rath expressed some uncertainty regarding the date he visited Respondent's offices. He testified that it was in "early February."

In sum, the fact that Respondent offered employment to the two applicants who did not identify themselves with the Union, but did not offer employment to the two applicants who did disclose their union affiliation, certainly creates some suspicion. It is indeed a factor to be considered. However, I do not believe that this factor, standing alone, is sufficient to prove, by a preponderance of the evidence, that animus entered into the hiring process.

In reaching the conclusion that this evidence—which might be called statistical evidence— is insufficient by itself to establish animus, I am mindful of the Board's recent decision in *W.D.D.W. Commercial Systems & Investments, Inc. d/b/a Aztech Electric Company; Contractors Labor Pool, Inc.*, 335 NLRB No. 25 (August 25, 2001). In that case, the Board found unlawful an employer's rule that it would not hire job applicants whose prior wage rates were 30 percent or more above the wage rates offered by the hiring employer. Citing *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the Board found this rule was inherently destructive of employee rights.

The Board analogized its theory to a "disparate impact" theory under Title VII of the Civil Rights Act of 1964. Under a "disparate impact" theory, policies which are fair on their face may be deemed unlawful if they discriminate in operation.

It might be possible to extend the "disparate impact" principle to a situation such as presented in the present case, where statistical evidence showed that an employer did not hire two overt union adherents but did hire others, including two applicants who did not reveal their affiliation with the union. But in this case, unlike *W.D.D.W.*, the evidence does not show that the Respondent was following any particular rule or practice in its hiring which might account for such an outcome. Absent evidence of a particular rule or practice which reasonably would have a disparate impact on union adherents, I do not believe it would be appropriate to apply a *Great Dane Trailers* rationale here.

Moreover, I do not feel comfortable relying solely upon the statistical evidence as a basis upon which to infer animus. In *Fluor Daniel, Inc.*, 333 NLRB No. 57 (February 27, 2001), the Board relied in part on statistical data to find that an employer's

hiring preferences, policies and procedures discriminated against applicants affiliated with the union and thereby violated the Act. However, the Board also stated, "We believe that the evidence, quite apart from the statistical data, supports the violations. The statistical data show the predictable consequences of that discrimination."

The statistical evidence in the present case certainly might bolster other evidence of unlawful intent, but considered by itself, I do not believe the statistical evidence here constitutes a preponderance of the evidence sufficient to carry the government's burden of proof.

The government also relies upon statements which two witnesses attribute to David E. Robinson. The Complaint alleges that Robinson is Respondent's supervisor and agent. Respondent denies this allegation. Therefore, before I may consider whether the statements in question are evidence that Respondent harbored animus, I first must determine whether these statements may be imputed to Respondent.

The General Counsel bears the burden of proving that Robinson is Respondent's supervisor and/or agent. The record fails to establish that Robinson was a supervisor. It also fails to establish that Respondent imbued Robinson with actual authority to serve as its agent. However, the government further contends that Robinson had apparent authority to act as Respondent's agent.

Before examining whether or not Robinson was Respondent's agent, I will summarize his encounter with Smith and Bornsheuer on February 12, 2001. Robinson did not testify at the hearing. Smith and Bornsheuer gave similar accounts of their encounter with Robinson.

When Smith and Bornsheuer arrived at Respondent's offices on that date, they told the receptionist they wanted to apply for work, and the receptionist gave them job application forms to complete. After doing so, they returned the forms to the receptionist.

A little later, Robinson appeared in the receptionist's area. According to Smith, when Robinson came to the receptionist's area, he was holding the applications which Smith and Bornsheuer had given to the receptionist.

Robinson gave Smith a card which identified Robinson as "Director Of Estimating" for Tejas Electrical Services, Inc. According to Smith, Robinson "said that the application made the field superintendent nervous so they sent him out to talk to us."

Although Bornscheuer's testimony does not attribute such a statement to Robinson, it does not expressly contradict Smith's version. As already noted, Robinson did not testify. Based on my observations of the witnesses, and the absence of any evidence to call into question Smith's testimony on this point, I credit his testimony.

Robinson invited Smith and Bornsheuer to accompany him to a back office. According to Smith, Robinson "explained that he was either a contractor or worked for a union contractor in the Washington D.C.—Virginia area. He was explaining how he enjoyed working for 'em because of how the benefit packages were structured he didn't have to worry it, the availability of the manpower, the quality of the work that they did."

Bornscheuer's testimony differs from Smith's in one significant way. Bornscheuer attributed to Robinson a statement suggesting that Robinson's superiors might have negative feelings towards unions. Bornscheuer testified: "We discussed the fact that Mr. Robinson had been working with a contractor in Washington, D.C., he was familiar with the union electricians, he felt they were, there was never any problem with their work, he was very satisfied with union work, he had no trouble with union employees but the person he worked for did not care for unions."

Unlike Bornsheuer, Smith did not attribute to Robinson a statement that the person he worked for did not care for unions. Again, based upon my observations of the witnesses and the absence of evidence which contradicts Bornscheuer on this point, I credit Bornscheuer's testimony.

Both Bornscheuer and Smith agree upon another significant fact. At no time during this conversation with Robinson did they discuss their applications for employment with Respondent. For example, counsel for the General Counsel asked Smith the following:

> Q: In listening to you, sir, I haven't heard anything mentioned regarding the fact that you had filed an application and were seeking employment. Was that something discussed between yourself and Mr. Robinson with Mr. Bornsheuer present.
>
> A: There was no discussion about work or employment at Tejas.

The General Counsel asked Bornscheuer a similar question and got a similar answer:

> Q: Did Mr. Robinson talk to you about that subject at all?
>
> A: No he did not.

In essence, Smith and Bornscheuer talked to Robinson about the benefits of being a union employer. Smith went to his car and returned with a copy of the working agreement between unionized electrical contractors and the Union. Smith also told Robinson about an "intermediate journeyman program" that would help Respondent to be competitive.

In examining this testimony, I note that Respondent is an employer in the construction industry. Thus, under Section 8(f) of the Act, it would be lawful for union representatives to discuss with the Respondent the possibility of entering into a prehire agreement with the Union. In that context, Smith's "sales pitch" to Robinson, that the Respondent should become a union employer, appears quite plausible.

After that discussion, the meeting ended. As already noted, the subject of the job applications did not arise.

The government contends that Respondent had imbued Robinson with the apparent authority to act as its agent.

In *Shen Automotive Dealership Group*, 321 NLRB 586 (1996), the Board adopted in relevant part the administrative law judge's decision, which quoted as follows from *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988):

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, Agency § 27 (1958, Comment). Two conditions, therefore, must be created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity.

To confer apparent authority on Robinson to act as its agent, Respondent must have made some manifestation to a third party. Before deciding whether the record here establishes such a manifestation, it is helpful to clarify what does and does not constitute this kind of manifestation.

In some circumstances, statements by members of management can create the reasonable impression that management has authorized a particular person to speak on its behalf. However, the General Counsel does not contend that any person in Respondent's management made any statement that Robinson had authority to speak on its behalf concerning the hiring process.

Actions by a management official also may establish that a person has apparent authority to act as management's agent. In *GM Electrics*, 323 NLRB 125 (1997), the respondent's owner was frequently out of the office and relied on his secretary to speak with job applicants and tell them about the respondent's hiring needs. The Board found this secretary to have apparent authority to act as the respondent's agent.

On the other hand, in *Custom Top Soil, Inc.*, 327 NLRB 121 (1998), the bookkeeper had no regular role in the hiring process and clearly indicated that she had no knowledge of management's hiring practices. Reversing the judge, the Board found that this bookkeeper had no apparent authority to act as Respondent's agent.

In the present case, the evidence fails to establish that management relied on Robinson to interview job applicants or tell them about Respondent's hiring practices. The only evidence to suggest that management had delegated this responsibility to Robinson comes from Robinson's own words. Specifically, Smith testified that Robinson "said that the application made the field superintendent nervous so they sent him out to talk to us."

However, the putative agent's own words do not constitute a "manifestation *by the principal*." (emphasis added) A person cannot make himself an apparent agent simply by claiming that status, any more than a person can make himself a deputy sheriff simply by pinning a tin star on his shirt. Before the acts of the self–proclaimed deputy may be attributed to the sheriff, the sheriff must have taken some action or made some statement which reasonably would lead others to believe the individual was acting with the sheriff's permission. Similarly, before the self–proclaimed agent's words may be attributed to the principal, the principal, and not the self–proclaimed agent, must have said or done something to lead others to believe that the agent was speaking on the principal's behalf.

Robinson's own words do not constitute a "manifestation by the principal" so I must look elsewhere for such a manifestation. It is not clear that Robinson's business card constitutes any statement by the principal concerning Robinson's authority. Computers, laser printers and perforated card stock have made the printing of business cards easy and inexpensive. I would hesitate to assume that a particular business card had been authorized by management when they can be created at home so readily.

However, even assuming for the sake of argument that Robinson's business card represents a statement by management concerning Robinson's authority, the statement does not create the impression that Robinson was engaged in the hiring process or that Respondent had authorized Robinson to speak about it with job applicants. The business card identifies Robinson as the "Director of Estimating." An estimator commonly calculates how much a contractor should bid on a project, or offer to charge for it. That function has little apparent connection to the hiring process.

Arguably, Respondent's appearance in the reception area, while holding the job applications, might constitute some indication that management had authorized him to deal with applicants concerning matters related to hiring. But again, these actions originate with Robinson, not with higher management. They hardly constitute a manifestation *by the principal*.

It may be argued that management would be unlikely to let an unauthorized person wander its halls, pick up job applications and talk to applicants about them. Thus, it might be reasonable to infer, from Robinson's presence in the offices, that he had authority to be there and to perform the function he was performing. As stated in *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1983), "an employer can be responsible for the conduct of an employee, as an agent, where under all the circumstances the employees would reasonably believe that the individual was reflecting company policy and acting on behalf of management."

Even if we assume that Robinson had authority to be on the Respondent's premises and to do what he was doing, we still have to look at what he was doing. There is no evidence that Robinson spoke with any job seekers about their applications or about the hiring process. To the contrary, both Smith and Bornsheuer testified that Robinson did not discuss their job applications. I cannot infer from Robinson's actions any authority to do something which he did not do. The General Counsel bears the burden of proving that Robinson acted with apparent authority from management. The evidence fails to carry this burden. Therefore, I will not attribute Robinson's statements to the Respondent.

Although I do not attribute Robinson's statements to Respondent, even if I did so, the statements would not establish that animus tainted the hiring process. According to Smith, Robinson "said that the application made the field superintendent nervous so they sent him out to talk to us." A statement that an application made a superintendent "nervous" falls short of establishing that animus would taint the hiring process.

Bornscheuer testified that Robinson told them "he had no trouble with union employees but the person he worked for did not care for unions." A statement that an employer does not care for unions does not signify that the employer will discriminate against them in violation of the law. Indeed, a person may not care for many things the law requires, such as paying taxes, but distaste does not equal disobedience. Likewise, an expression of distaste does not, by itself, connote an intent to disobey.

Section 8(c) of the Act states that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

I conclude that the statement that Robinson's boss "does not care for unions" is a statement of opinion, and that it contains no threat of reprisal or force or promise of benefit. Similarly, a statement that a particular application made a superintendent "nervous" constitutes a statement of opinion which contains no threat of reprisal or force or promise of benefit.

In sum, even if Robinson were considered to be management's agent, his statements do not establish that animus tainted the hiring process.

For all these reasons, I find that the government has not proven that Respondent failed to hire Smith and Bornscheuer in violation of Section 8(a)(3) and (1), and therefore recommend that these allegations be dismissed.

The Refusal to Consider Allegations

Complaint paragraphs 8 and 9 also allege that since on or about February 12, 2001, Respondent has refused to consider Smith and Bornscheuer for employment because they formed, joined or assisted the Union and engaged in concerted activities and to discourage others from engaging in these activities.

As already noted, the Board held in *FES* that for refusal–to–consideer allegations, the government must show, as part of its case–in–chief, that the employer excluded applicants from a hiring process, and that antiunion animus contributed to the decision not to consider the applicants for employment. See *FES (A Division of Thermo Power)*, 331 NLRB No. 20, slip op. at 7. Once these elements are established, the burden will shift to the Respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

The evidence here does not establish that Respondent excluded Smith or Bornscheuer from the hiring process. To the contrary, it is uncontradicted that Respondent accepted the job applications filed by these individuals. The record fails to establish that Respondent excluded these applicants from the pool under consideration.

For reasons already discussed, the record also fails to establish that antiunion animus tainted the selection process. In these circumstances I find that the government has not proven the necessary elements. Therefore, I recommend that the Board dismiss these allegations.

CONCLUSION

For the reasons discussed, I find that a preponderance of the evidence does not establish the unfair labor practice allegations raised by the Complaint. Therefore, I recommend that the Board dismiss the Complaint in its entirety.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

The hearing is closed.

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P R O C E E D I N G S

THE COURT: This is a bench decision in a case of Tejas Electrical Services, Inc., which I will call the Respondent, and International Brotherhood of Electrical Workers Local Union No. 716, which I will call the Charging Party or the Union. The case number is 16–CA–20937. This decision is issued pursuant to section 102.35A10 in section 102.45 in the Boards Rules and Regulations.

I find that a preponderance of the evidence does not establish that Respondent discriminated against two job applicants in the manner described in the complaint and recommend that the complaint be dismissed.

Procedural history: This case began on February 21, 2001, when the Charging Party filed its initial charge in this proceeding. In April 2001, after investigation of the charge, the regional director of Region 16 of the National Labor Relations Board issued a complaint and notice of hearing, which I will call the complaint. In issuing this complaint, the regional director acted on behalf of the General Counsel of the Board, whom I will refer to as the General Counsel or as the Government.

Admitted allegations: Respondent filed a timely answer to the complaint. Based upon admissions in this answer, I find that the Government has proven the allegations in

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complaint paragraphs 1, 2, 3, 4, and 5. More specifically, I find that at all material times Respondent has been an employer engaged in commerce within the meaning of section 226 and 7 of the act, and Charging Party has been a labor organization within the meaning of section 25 of the act.

Unfair labor practice allegations: Complaint paragraphs 8 and 9 allege that since on or about February 12, 2001, Respondent has refused to consider and/or hire two job applicants, Jack Smith and Jack Bornsheuer, because they formed, joined, or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. Respondent denies these allegations.

The record establishes that on February 12, 2001, four persons affiliated with the Union applied for work at the Respondent's office. Two of these individuals, Smith and Bornsheuer, submitted applications which revealed their relationship with the Union. The other two, Gordon Casey and Ray Rath, sub-

mitted applications which did not disclose their union affiliation. Respondent hired Casey and Rath in February 2001. It hired other applicants in the period March through July 2001. However, Bornsheuer never received a job offer from Respondent. Smith did not receive such an offer until October 2001.

The *FES* standard: To evaluate these allegations, I will follow the framework established by the board and *FES*, a

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division of formal power, 331 NLRB [9 (2000).] In that case, the board stated that to prove a refusal to hire the General Counsel must first establish the following. One, that the Respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct. Two, that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire or the alternative that they employer has not adhered uniformally to such requirements by that the requirements were themselves pretextual or were applied as a pretext for discrimination. And three, that anti–union animus contributed to the decision not to hire the applicants.

Once these elements were established the board will then shift to the Respondent to show that it would not have hired the applicants even in absence of their union activity or affiliation. If the Government meets its burden and the Respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of section 883 has been established.

With respect to refusal to consider allegations, the board held in *FES* that the Government must show, as part of its case and chief, that the employer excluded applicants from a hiring process and that anti–union animus contributed to the decision not to consider the applicants for employment. See

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FES, a division of formal power, 331 NLRB [9]. Once these elements are established the burden will shift to the Respondent to show that it would not have considered applicants even in the absence of their union activity or affiliation. See also *Konawa Stone Company, Inc*. 334 NLRB No. 20, June 6th, 2001.

The refusal to hire allegations: The General Counsel has established the first *FES* element. The record clearly establishes that Respondent was hiring employees on February 12, 2001. On that date had hired at least two workers, Rath and Casey. The next six months it hired at least five other employees. The Government also has established the second *FES* element. Both Casey and—both Smith and Bornsheuer were fully qualified journeyman electricians. The General Counsel has not proven the third *FES* element, that anti–union animus contributed to the decision not to hire the applicants. To make such a showing, the Government relies on two types of evidence. First, it argues that such animus may be inferred from the hiring pattern itself. Second, it contends that a person named David Robinson possessed apparent authority to act as Respondent's agent and that Respondent made statements which reflect animus—and that Robinson made statements which reflect animus in the hiring process.

In appropriate cases, an inference of animus may be drawn from evidence which includes a hiring pattern suggesting

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disparate treatment. The board significantly noted in *FES* quote, "In most cases where 883 violations are found, the conclusion is inferred from all of the circumstances. We know of no case which—this approach and we would not abandon it," end quote.

Here the General Counsel has presented evidence which, in some ways, resembles a scientific experiment. Four individuals applied for employment. The two applicants who did not disclose their union affiliation were hired right away, but the two applicants who did disclose their union affiliation did not receive such prompt offers of employment. If the two applicants hired by Respondent are considered, in scientific terms, to be controls then results suggest a strong correlation between disclosure of union affiliation and not The Respondent contends that this experiment is flawed. It argues that Houston area of—contractors knew that one of the employees that did hire on February 12, 2001, Ray Rath, was affiliated with the Union. However, the Respondent did not present evidence that this management was aware of Rath's union affiliation on the day he applied for work.

The experience may in imperfect in another way. The evidence does not establish that Respondent had more than two openings to fill on February 12th, 2001, or that it hired more than two applicants. If the two individuals hired on February

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12th, 2001, Rath and Casey, applied before Smith and Bornsheuer then this priority demonstration non–discriminatory reason for hiring them rather than the latter two applicants.

Smith testified that he and Bornsheuer arrived at the Respondent's offices before Rath and Casey, but this testimony must be examined carefully because it is not based upon first hand observations. Smith did not testify that he was waiting at Respondent's offices and saw Rath or Casey walk in. Indeed the record does not indicate that either Smith or Bornsheuer saw Rath or Casey that day at Respondent's offices. Rather Smith bases his conclusion that he and Bornsheuer arrived at the offices before Rath and Casey on conversations he had later with those two applicants. But when Rath and Casey testified, they did not provide information which would support the conclusion Smith drew. Either they told Smith something different from their testimony or else Smith drew an unwarranted conclusion from what they said to him.

Both Smith and Bornsheuer testified that they arrived at Respondent's offices about ten a.m. on February 12, 2001. Casey testified that he arrived some time between ten and 10:30 a.m. on that date. That testimony is consistent with Smith's claim that he and Bornsheuer arrived first but it not rule out the opposite possibility.

Additionally, it seems possible that one of more of the witnesses may have been mistaken about the time of arrival.

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If all of them arrived at the stated times it would appear rather likely for Smith and Bornsheuer to have seen Casey at

some point, but they did not. In these circumstances, I am not convinced that the witnesses recall their times of arrival with sufficient certainty to establish which of them arrived first.

Rath's testimony is even less certain. Although his application is dated February 12, 2001, Rath expressed some uncertainty regarding the date he visited Respondent's offices. He testified that it was in, quote, "early February", end quote.

In sum, the fact that Respondent offered employment to the two applicants who did not identify themselves with the Union but did not offer employment to the two applicants who did disclose their union affiliation certainly creates some suspicion. It is, indeed, a factor to be considered. However, I do not believe that this factor, standing alone, is sufficient to prove by a preponderance of the evidence that animus entered into the hiring process. In reaching this conclusion that this evidence, which might be called statistical evidence, is insufficient by itself to establish. I am mindful of the board's recent decision in WDDW Commercial Systems and Investments, Inc., *da Aztec Electric Company Contractors Labor Pools, Inc*., 335 NLRB No. 25, August 25, 2001. In that case, the board found unlawful an

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employer's rule that it would not hire job applicants whose prior wage rates were thirty percent or more above the wage rates offered by the hiring employer. Citing NLRB versus Great Dane Traders 388US261967, the board found this rule was inherently destructive of employee rights. The board analogized his theory to a disparate impact theory under Title of the Civil Rights Act of 1964. Under a disparate impact theory, policies which are fair on their face may be deemed unlawful if they discriminate in operation.

It might be possible to extend the disparate impact principle to a situation such as presented in the present case where statistical evidence show that an employer did not hire two overt union adherents but did hire others including two applicants who did not reveal their affiliation with the Union. But in this case, unlike WDDW, the evidence does not show that the Respondent was following any particular rule or practice in this hiring which might account for such an outcome. Evidence—and some evidence that a particular rule or practice, which reasonably would have a disparate impact on union adherents, I do not believe it would be appropriate to apply a Great Dane Traders rationale here.

Moreover, I do not feel comfortable relying solely upon the statistical evidence as a basis upon which to infer animus. In—Inc., 333 NLRB No. 57, February 27, 2001, the board relied in part on statistical data to find that an

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employer's hiring preferences, policies, and procedures discriminated against applicants affiliated with the Union and, thereby, violated the act. However, the board also stated, quote, "we believe that the evidence, quite apart from the statistical data, supports the violations. The statistical data shows—the statistical data show the predictable consequences of that discrimination", end quote.

The statistical evidence in the present case certainly might bolster other evidence of unlawful intent, but considered by itself I do not believe the statistical evidence here constitutes a preponderance of the evidence sufficient to carry the Government's burden of proof.

The Government also relies upon statements which two witnesses contribute to David E. Robinson. The complaints alleges that Robinson is Respondent's supervisor and agent. Respondent denies this allegation. Therefore, before I may consider whether the statements in question are evidence that Respondent harbored animus I first must determine whether these statements may be imputed to Respondent. The General Counsel bears the burden of proving that Respondent—that Robinson is Respondent's supervisor and/or agent. The record fails to establish that Respondent was a supervisor. It also fails to establish that Respondent imbued Robinson with actual authority to serve as his agent. However, the Government further contends that Robinson had apparent authority to act

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as Respondent's agent.

Before examining whether or not Robinson was Respondent's agent, I will summarize his encounter with Smith and Bornsheuer on February 12, 2001. Robinson did not testify at the hearing. Smith and Bornsheuer gave similar accounts to their encounter with Robinson. When Smith and Bornsheuer arrived at Respondent's offices on that date, they told the receptionist they wanted to apply for work and the receptionist gave them job application forms to complete. After doing so they returned the forms to the receptionist. A little later, Robinson appeared in the receptionist area. According to Smith, when Robinson came to the receptionist area he was holding applications which Smith and Bornsheuer had given to the receptionist. Robinson gave Smith a card which identified Robinson as, quote, "director of estimating", end quote, for Tejas Electrical Services, Inc. According to Smith, Robinson, quote, "said that the application made the field superintendent nervous so they sent him out to talk to us", end quote.

Although Bornsheuer's testimony does not attribute such a statement to Robinson, it does not expressly contradict Smith's version. As already noted, Robinson did not testify. Based on my observations of the witnesses and the absence of any evidence to call on to question Smith's testimony on this point, I credit his testimony.

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Robinson invited Smith and Bornsheuer to accompany him to a back office. According to Smith, Robinson, quote, "Explained that he was either a contractor or worked for a union contractor in the Washington, D.C., Virginia area. He was explaining how he enjoyed working for them because of how the benefit packages were structured. He didn't have to worry. The availability of the man power, the quality of the work that they did", end quote.

Bornsheuer's testimony differs from Smith's in one significant way. Bornsheuer attributed to Robinson a statement suggesting that Robinson's supervisors might have negative feelings towards unions. Bornsheuer testified that, quote, "We

discussed the fact that Mr. Robinson had been working with a contractor in Washington, D.C. He was familiar with the Union electricians. He felt they were—there was never any problem with their work. He was very satisfied with union work. He had no trouble with union employees but the person he worked for did not care for unions", end quote. Unlike Bornsheuer, Smith did not attribute to Robinson a statement that the person he worked for did not care for unions. Again, based upon my observations of the witnesses and the absence of evidence which contradicts Bornsheuer on this point, I credit Bornsheuer's testimony.

Both Bornsheuer and Smith agree upon another significant fact. At no time during this conversation with

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Robinson did they discuss their applications for employment with Respondent. For example, counsel for the General Counsel asks Smith the following. Question: In listening to you, sir, I haven't heard anything mentioned regarding the fact that you had filed an application and were seeking employment. Was that something discussed between yourself and Mr. Robinson with Mr. Bornsheuer present? Answer: There was no discussion about work or employment at Tejas. The General Counsel asked Bornsheuer a similar question and got a similar answer. Question: Did Mr. Robinson talk to you about that subject at all? Answer: No. He did not.

In essence, Smith and Bornsheuer talked to Robinson about the benefits of being a union employer. Smith went to his car and returned with a copy of the working agreement between unionized electrical contractors and the Union. Smith also told Robinson about an, quote "intermediate journeyman program", end quote, that would help Respondent to be competitive. In examining this testimony, I note that Respondent as an employer in the construction industry. Thus, under section 8F of the Act, it would be lawful for union representatives to discuss with the Respondent the possibility of entering into a pre–hire agreement with the Union. In that context, Smith's sales pitch to Robinson that the Respondent should become a union employer appears quite possible.

After that discussion, the meeting ended. As already

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noted, the subject of the job applications did not arise. The Government contends that Respondent had imbued Robinson with the apparent authority to act as its agent. In *Shin Automotive Dealership Group*, 321 NLRB 586, 1996, the board adopted in relevant part the administrative law judge's decision, which quoted as follows from service employees Local 87, *Lessbay Maintenance* 291 NLRB 82, 1988. Apparent authority is created through a manifestation by the principal through a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question. NLRB versus *Dawkins Inn*, 532 FED second 138, 141, Ninth Circuit, 1976. *Alliance Rubber Company* 286 NLRB 645, 646, footnote 4, 1987. Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him or the principal should realize that this conduct is likely to create such belief. Restatement Second Agency, section 27, 1958 comment. Two conditions, therefore, must be created. One, there must be some manifestation by the principal to a third party. And two, the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity, end quote. To confer apparent authority on Robinson to act as its agent, Respondent must have made some manifestation to a third party. Before deciding whether the record here establishes such a manifestation it is helpful to

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clarify what does and does not constitute this kind of manifestation.

In some circumstances, statements by members of management can create the reasonable impression that management has authorized a particular person to speak on its behalf. However, the General Counsel does not contend that any person in Respondent's management made any statement that Respondent had authority to speak on its behalf concerning the hiring process. Actions by a management official also may establish that a person has apparent authority to act as management's agent. In *GM Electric's* 323 NLRB 125, 1997, the Respondent's owner was frequently out of the office and relied on a secretary to speak with job applicants and tell them about the Respondent's hiring needs. The board found this secretary to have apparent authority to act as the Respondent's agent.

On the other hand, in *Custom Top Soil, Inc.* 327 NLRB 121, 1998, the bookkeeper had no regular role in the hiring process and clearly indicated that she had no knowledge of management's hiring practices. Reversing the judge, the board found that this bookkeeper had no apparent authority to act as Respondent's agent. In the present case, the evidence fails to establish that management relied on Robinson to interview job applicants or tell them about Respondent's hiring practices. The only evidence to suggest that management had

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delegated this responsibility to Robinson comes from Robinson's own words. Specifically, Smith testified that Robinson, quote, "Said that the application made the field superintendent nervous so they sent him out to talk to us", end quote.

However, the putative agents own words do not constitute a manifestation by the principal. A person cannot make himself an apparent agent simply by claiming that status any more than a person can make himself deputy sheriff simply by pinning a tin star on his shirt. Before the acts of the self–proclaimed deputy may be attributed to the sheriff, the sheriff must have taken some action or made some statement which reasonably would lead others to believe the individual was acting with the sheriff's permission. Similarly, before the self–proclaimed agent's words may be attributed to the principal, the principal and not the self–proclaimed agent, must have said or done something to lead others to believe that the agent was speaking on the principal's behalf.

Respondent's—Robinson's only words do not constitute a, quote, "manifestation by the principal", end quote, so I must look elsewhere for such a manifestation. It is not clear that Robinson's business card constitutes any statement by the prin-

cipal concerning Robinson's authority. Computers, laser printers, and perforated card stock have made the printing of business cards easy and inexpensive. I would hesitate to

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assume that a particular business card had been authorized by management when they can be created at home so readily.

However, even assuming for the sake of argument that Robinson's business card represents a statement by management concerning Robinson's authority, the statement does not create the impression that Robinson was engaged in the hiring process or that Respondent had authorized Robinson to speak about it with job applicants. The business card identifies Robinson as the quote, "director of estimating", end quote. An estimator commonly calculates how much a contractor should bid on a project or offer to charge for it. That function has little apparent connection to the hiring process. Arguably, Respondent's appearance in the reception area while holding the job applications might constitute some indication that management had authorized him to deal with applicants concerning matters related to hiring. But again, these actions originate with Robinson not with higher management. They hardly constitute a manifestation by the principal.

It may be argued that management would be unlikely to let an unauthorized person to wander its halls, pick up job applications, and talk to applicants about them. Thus, it might be reasonable to infer from Robinson's presence in the offices that he was—that he had authority to be there and to perform the function he was performing. As stated in—*Supermarket* 313 NLRB 7485, 1983, quote, "An employer can be

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responsible for the conduct of an employee as an agent. For under all the circumstances the employees would reasonably believe that the individual was reflecting company policy and acting on behalf of management", end quote.

Even if we assume that Robinson had the authority to be on the Respondent's premises and to do what he was doing, we still have to look at what he was doing. There is no evidence that Robinson spoke with any job seekers about their applications or about the hiring process. To the contrary, both Smith and Bornsheuer testified that Robinson did not discuss their job applications. I cannot infer from Robinson's actions any authority to do something which he did not do. The General Counsel bears the burden of proving that Robinson acted with apparent authority for management. The evidence fails to carry this burden. Therefore, I will not attribute Robinson's statements to the Respondent.

Although I do not attribute Robinson's statements to Respondent, even if I did so the statements would not establish that animus tainted the hiring process. According to Smith, Robinson, quote, "Said that the application made the field superintendent nervous so they sent him out to talk to us", end quote. A statement that an application made a superintendent nervous falls short of establishing that animus would taint the hiring process. Bornsheuer testified that Robinson told them, quote, "he had no trouble with union

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employees but the person he worked for did not care for unions", end quote. A statement that an employer does not care for unions does not signify that the employer will discriminate against them in violation of the law. Indeed, a person may not care for many things the law requires, such as paying taxes, but this case does not equal disobedience. Likewise, an expression of distaste does not, by itself, connote an intent to disobey.

Section 8C of the Acts states that, quote, "The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act. If such expression contains no threat of reprisal or force or promise of benefit", end quote. I conclude that the statement that Robinson's boss, quote, "does not care for unions", end quote, is a statement of opinion and that it contains no threat of reprisal or force or promise of benefit. Similarly, a statement that a particular application made a superintendent nervous constitutes a statement of opinion which contains no threat of reprisal or force or promise of benefit.

In sum, even if Robinson would be considered to be management's agent, these statements do not establish that animus tainted the hiring process. For all those reasons, I

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find that the government has not proven that Respondent failed to hire Smith and Bornsheuer in violation of Section 8831 and, therefore, recommend that these allegations be dismissed.

The refusal to consider allegations: Complaint paragraphs 8 and 9 also allege that since on or about February 12th, 2001, Respondent has refused to consider Smith and Bornsheuer for employment because they formed, joined, or assisted the Union and engaged in concerted activities and to discourage others from engaging in these activities. As already noted, the board held an *FES* that for refusal to consider allegations, the Government must show as part of its case and chief that the employer excluded applicants from a hiring process and that anti–union animus contributed to the decision not to consider the applicants for employment. See *FES*, a division of formal power, 221 NLRB [129 (1975)]. Once these elements are established, the burden will shift to the Respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

The evidence here does not establish that Respondent excluded Smith or Bornsheuer from the hiring process. To the contrary, it is uncontradicted that Respondent accepted the job applications filed by these individuals. The record fails to establish that Respondent excluded these applicants from the pool under consideration. For reasons already discussed,

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the record also fails to establish that anti–union animus tainted the selection process. In these circumstances, I've find that the Government has not proven the necessary elements. Therefore, I recommend that the Board dismiss these allegations.

Conclusion: For the reasons discussed, I find that a preponderance of the evidence does not establish the unfair labor prac-

tice allegations raised by the complaint. Therefore, recommend that the Board dismiss the complaint in its entirety. When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. This certification also will include provisions relating to a findings of fact, conclusions, and order. When that certification is served upon the parties the time period for filing an appeal will begin to run.

The hearing is closed. Off the record. (Whereupon, the proceedings were concluded at 9:31 a.m., October 30, 2001.)

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CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board, Ft. Worth Region, Region 16,

Case Name: Tejas Electrical Services, Inc.
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Location: Houston, Texas
Date Held: October 30, 2001

was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing, unless otherwise stated.

_____ _____

DATE CONTRACTOR